

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

BETWEEN:

GILLIAN FRANK AND JAMIE DUONG

Appellants

- and -

ATTORNEY GENERAL OF CANADA

Respondent

- and -

THE ATTORNEY GENERAL OF NOVA SCOTIA

Intervener

- and -

THE ATTORNEY GENERAL OF QUEBEC

Intervener

MEMORANDUM OF ARGUMENT OF THE PROPOSED INTERVENER,
THE CANADIAN AMERICAN BAR ASSOCIATION
(Motion for Leave to Intervene pursuant to Rules 47 and 55-59 of the *Rules of the Supreme Court of Canada*)

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PART I - STATEMENT OF FACTS

1. The Canadian American Bar Association (“CABA”) seeks leave to intervene in this appeal, to deliver a factum of not more than 10 pages and to make oral argument of no longer than 15 minutes at the hearing of the appeal.
2. The CABA is a California-based non-profit association of Canadian and American lawyers and foreign legal consultants with strong cross-border ties through citizenship, education and professional designation. Its mission is to provide an associational forum and voice to Canadians in the United States and Canadians at home in relation to cross-border legal issues. Through its programming, the CABA fosters a greater understanding of laws with cross-border implications and an engagement in their development.¹
3. The CABA provides educational, networking and social opportunities for its members to allow them to connect with each other and help them stay connected to legal and political developments affecting Canada and the United States. The CABA’s members include in-house counsel, attorneys in private practice, government lawyers, legal consultants, law school faculty and law students. The majority of the CABA’s members are Canadian citizens that work and live in the United States.²
4. This is an important appeal concerning a restriction on the core democratic right to vote in section 3 of the *Canadian Charter of Rights and Freedoms* (the “*Charter*”).³ The Court will have the opportunity to determine the constitutionality of provisions of the *Canada Elections Act*, S.C. 2000, c. 9 (the “*Act*”) which deny Canadian citizens (subject to certain limited exceptions) the right to vote if they have resided outside of Canada for more than five years.⁴
5. Roughly 1.4 million long-term expatriate Canadians including members of the CABA have been disenfranchised and barred from voting as a result of the impugned provisions

¹ Affidavit of Ivo Entchev sworn September 16, 2016 at para. 12; Exhibits “A”, “C”, “D” and “E” [Entchev Affidavit].

² Entchev Affidavit at paras. 12, 15; Exhibits “A”, “B”.

³ *Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

⁴ As stated in the Order Stating Constitutional Questions dated June 2, 2016, the sections at issue in the Act are sections 11(d), 222(1)(b) and (c), 223(1)(f), 226(f) and the word “temporarily” in sections 220, 222(1) and 223(1)(e).

in the Act and the majority decision of the Court of Appeal for Ontario below.⁵ The CABA has cross-border legal expertise, special knowledge, and a unique perspective on this issue. It also has a vital interest in making submissions on behalf of those long-term Canadians living abroad who have been deemed unworthy to vote, despite deep and continuing connections to Canada, and despite being subject to benefits and burdens that are tied to their citizenship regardless of whether they live in Canada or abroad.⁶

6. Given that there is no dispute of a section 3 breach, if granted leave to intervene the CABA's submissions will address whether the impugned sections of the Act can be saved by section 1 of the *Charter*. Specifically, the CABA will focus on whether the "pressing and substantial objective" of preserving the unwritten "social contract" can withstand the rigorous *Charter* scrutiny that is required where the government seeks to justify a violation of a core democratic right. In our submission, the answer is no.
7. In light of the CABA's interest and expertise on the key issues, and its ability to offer a fresh perspective on the meaning of the "social contract" in a globalized, interdependent world, it is well placed to assist the Court as an intervenor. The CABA's intervention will not delay the hearing of this appeal or prejudice the interests of the parties.

PART II - QUESTIONS IN ISSUE

8. As established by this Court,⁷ the issues in this motion for leave are as follows:
 - (a) Does the CABA have a real interest in the subject matter of the appeal;
 - (b) Will the CABA's submissions be useful to the Court; and
 - (c) Will the CABA's submissions be different from those of other parties?
9. The CABA submits that the answer to these questions is yes.

⁵ *Frank et al. v. Canada (Attorney General)*, 2014 ONSC 907 at paras. 19-20 [*Frank – Application Decision*]; *Frank v. Canada (Attorney General)*, 2015 ONCA 536 at paras. 8, 65 [*Frank – Court of Appeal Decision*].

⁶ Entchev Affidavit at paras. 10, 25.

⁷ *Reference re Workers' Compensation Act (1983) (Nfld.) (Application to Intervene)*, [1989] 2 S.C.R. 335 at 339 [*Workers' Compensation Reference*].

PART III - STATEMENT OF ARGUMENT

A. The CABA has a Real Interest in this Appeal

10. The CABA views this appeal from the perspective of its long-term expatriate Canadian members who, individually and collectively, maintain close connections with Canadian law and politics. Through that unique lens, the CABA believes that the fundamental right to vote guaranteed to “every Canadian citizen” in section 3 of the *Charter* should not give way to the exigencies of employment or other reasons why Canadians may need or wish to reside abroad on a long-term basis.⁸ The CABA represents members who fall into a category of what is now effectively second-class citizenship because they have been disenfranchised by their own government.⁹ Ironically, this group of Canadians living abroad was recently solicited to make donations to the federal Liberal Party of Canada.¹⁰
11. The notion that all long-term Canadian expatriates have “severed their connections with Canada in the pursuit of their own livelihoods”, as the majority concluded in the court below, is (in the CABA’s respectful view) wrong and offensive. The lived experiences of members of the CABA, and the work the CABA does to help keep Canadians abroad connected with their home country, demonstrates otherwise. As a transnational association, the CABA demonstrates how many Canadians, long admired for our internationalism, are able to live out our citizenship abroad in a world that is becoming smaller due to globalization, easy travel and communication technologies.¹¹
12. It is more common than ever for Canadians to live outside of Canada for long periods of time. It is also common for these citizens to care deeply about Canada and to stay closely involved with Canadian affairs. Both short-term and long-term Canadian expatriates,

⁸ Entchev Affidavit at para. 24.

⁹ Entchev Affidavit at paras. 10, 25.

¹⁰ Entchev Affidavit at para. 22; Exhibit “I”.

¹¹ Entchev Affidavit at para. 26.

including those who have lived abroad for five or more years, often maintain strong links to Canada and participate (often very actively) in Canadian society and democracy.¹²

13. Approximately 1.4 million Canadian citizens of voting age have lived abroad for more than five years and are disenfranchised by the impugned provisions in the Act. Justice Laskin, dissenting in the court below, took notice of this class of citizens as follows:

These Canadian citizens, abroad for a wide variety of reasons both personal and professional...often maintain strong ties and affinity to Canada. They have not renounced membership in the Canadian polity. But under the legislation, the place of their residence deems them unworthy to be entitled to vote.¹³

14. The CABA brings together and represents these contemporary Canadian citizens. It provides a forum for its members to participate in political and legal debates that affect Canada. While this motion for leave to intervene marks the CABA's first foray into litigation in Canada or the United States, this appeal fits hand-in-glove with the mandate, expertise and proper role of the CABA and its members.¹⁴

B. The CABA will Assist the Court

15. In light of the CABA's mandate, involvement in cross-border legal issues and lived experiences of its members, the CABA's submissions are likely to assist this Court.¹⁵
16. The CABA has a unique ability to share the viewpoint of a distinct cross-section of Canadian expatriates who are or will be disenfranchised if the impugned provisions in the Act are allowed to stand. Composed of individuals with legal training who regularly engage with cross-border issues in the course of their professional activities, CABA members are uniquely positioned to contribute to Canadian political debate. Many have

¹² Entchev Affidavit at paras. 25-26.

¹³ *Frank – Court of Appeal Decision*, *supra* note 5, at para. 242 (per Laskin J. dissenting).

¹⁴ Entchev Affidavit at paras. 12, 23.

¹⁵ Entchev Affidavit at para. 28.

held positions in Canadian democratic institutions. Members of the CABA are the people affected by the provisions at issue in the Act.¹⁶

17. The CABA's institutional perspective as a bar association that is focused on cross-border legal issues distinguishes it from the two individual appellants and the other proposed interveners, and will assist in resolving the important constitutional questions before the Court. The Court will benefit from hearing submissions from a sizable and distinct group of Canadians, beyond the appellants, who are impacted by the outcome of this appeal.¹⁷
18. The CABA is committed to ensuring that it makes a unique and useful contribution to this Court. It has retained experienced counsel who has appeared before this Court on many occasions to assist in making submissions. The CABA and its counsel will strive to ensure that those submissions are not duplicative, and has already made efforts to ensure that they will not mirror those of the parties or other proposed interveners.¹⁸

C. The CABA will Bring a Different Perspective

19. This Court has stated that “an intervention is welcomed if the intervener will provide the Court with fresh information or a fresh perspective on an important constitutional or public issue.”¹⁹ The CABA will provide such a “fresh perspective”. Its submissions will be different from the perspective of the two individual appellants, as they will be distinctively grounded in the CABA's interest, awareness and expertise in laws with cross-border implications, as well as the real-world life experience of its members.²⁰
20. If granted leave to intervene, the CABA intends to argue that the section 3 infringement is not a reasonable limit prescribed by law as can be demonstrably justified in a free and

¹⁶ Entchev Affidavit at para. 27.

¹⁷ Entchev Affidavit at para. 28.

¹⁸ Entchev Affidavit at paras. 41-42.

¹⁹ *Workers' Compensation Reference*, *supra* note 7, at p. 340.

²⁰ Entchev Affidavit at para. 11.

democratic society. It will make three submissions regarding the objective of “preserving the social contract” upon which the majority decision below is based.²¹

(1) The “contract” is based on an outdated territorial view of citizenship

21. Preserving the social contract is neither a pressing nor substantial objective. It derives from an outdated territorial-based notion of citizenship that is firmly rooted in the past (possibly even the distant past of 18th century political philosophers). In today’s globalized and interdependent world, Canada’s best and brightest citizens are required or encouraged to go abroad – whether to attend top universities or to work for leading international companies. Even if territorial or residency-based notions of citizenship were ever appropriate to underpin the right to vote, that is not the case today.²²
22. To the extent there is a social contract between citizen and state, participation in associations such as the CABA demonstrate how Canadians can and do perform that contract from outside Canada’s borders, including through their participation in cross-border educational and business events, their financial support of political parties in Canada and their contribution to global academic scholarship and legal developments.²³

(2) Canadian laws confer extra-territorial burdens and benefits

23. The unstated but necessary implication of the social contract theory is that it is a “contract” that is opted out from by long-term expatriates: they have broken the “contract” by leaving Canada behind. This is not the case. Canada has followed them. Many Canadian laws apply with extra-territorial effect, conferring both burdens and benefits upon Canadians living abroad regardless of their level of affinity or connection to Canada.²⁴
24. The following is an illustrative, non-exhaustive, list of federal laws that may impose extra-territorial burdens:

²¹ Entchev Affidavit at para. 35 *et seq.*

²² Entchev Affidavit at para. 36.

²³ Entchev Affidavit at para. 36.

²⁴ Entchev Affidavit at para. 37. See also: *Frank – Application Decision*, *supra* note 5, at para. 89.

(a) Tax laws. The *Income Tax Act* (“*ITA*”) applies extra-territorially in several ways.²⁵ For example, any person that is a “resident” of Canada is taxable in Canada on their world-wide income, including income earned from activities taking place entirely outside of Canada. In this context, the concept of residency in the *ITA* is very broad and can include people that have no physical presence in Canada during a particular year.²⁶ Another example is that the *ITA* imposes on every employer paying salary or remuneration to a person resident in Canada the obligation (subject to penalties) to make source withholdings on account of Canadian income taxes. This obligation extends to employers that are not located in Canada paying employees that, while Canadian “residents”, performed all of their services outside of Canada.²⁷

(b) Criminal laws. Although the *Criminal Code*²⁸ contains a presumption against extra-territoriality in section 6(2), numerous federal criminal laws expressly apply to Canadian nationals outside of Canada. These include offences in relation to sexual offences against children pursuant to section 7(4.1), the offence of treason in section 46, the offence of piracy in sections 74, certain terrorism offences in Part II.1²⁹ and the offence of torture in section 269.1.

(c) Foreign anti-corruption laws. Offences under the *Corruption of Foreign Public Officials Act* that are committed outside of Canada are deemed to have been committed in Canada on the basis of nationality jurisdiction, regardless of residency.³⁰

(d) Special economic measures. Canada may make orders or regulations prohibiting the dealings of Canadians “outside Canada” with foreign sanctioned states.³¹

(e) Corporate social responsibility. Certain companies that operate in the extractive sector “in Canada or elsewhere” are, if they meet certain statutory criteria, subject to special reporting and disclosure obligations.³²

25. The following benefits that may apply to Canadians residing abroad are also notable:

(a) Right of entry to Canada from foreign soil. Section 6 of the *Charter* guarantees every Canadian citizen “the right to enter, remain in and leave Canada”. The right to enter must necessarily be exercised from outside Canadian territory;³³

²⁵ In addition to the tax obligations described in this Memorandum, the Application Judge found that many Canadians living abroad have tax obligations back in Canada relating to income generated in Canada: *Frank – Application Decision*, *supra* note 5, at para. 28. This finding was undisturbed on appeal.

²⁶ *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), section 3, 250(3) [*ITA*].

²⁷ *ITA*, *ibid.*, section 153(1)(a); *Income Tax Regulations*, C.R.C., c. 945 (Income Tax Act), sections 102, 104(2).

²⁸ *Criminal Code*, R.S.C. 1985, c. C-46.

²⁹ “Terrorist activity” is defined in section 83.01(1)(b) as including acts or omissions “in or outside Canada.”

³⁰ *Corruption of Foreign Public Officials Act*, S.C. 1998, c. 34, section 5(1).

³¹ *Special Economic Measures Act*, S.C. 1992, C. 16, section 4(2).

³² *Extractive Sector Transparency Measures Act*, S.C. 2014, c. 39, s. 376, sections 2, 9(1), 9(2) and 9(5).

(b) Government benefits. Non-resident Canadians may continue to receive benefits from the Canada Pension Plan³⁴ and Old Age Security Program;³⁵ and

(c) Citizenship laws. Canadians living abroad may pass on their citizenship to their biological or adopted children,³⁶ or may apply to renounce their citizenship.³⁷

26. As this brief survey illustrates, the conclusion of the majority below that “most of Canada’s laws have little practical impact on non-resident citizens”³⁸ is simplistic at best.

(3) The “contract” obscures vital aspects of the right to vote

27. The majority of the Court below described the section 3 breach at issue as “straightforward”, and addressed the right to vote solely in the context of a social contract-based analysis that is more focused on finding a justification for the infringement than on understanding the nature of the underlying right.³⁹

28. This analysis obscures essential, though perhaps more subtle, dimensions of the right to vote. Section 3 is a fundamental and core *Charter* right that could not be more important. It is the first democratic right listed in the *Charter*, and is not subject to override pursuant to the section 33 notwithstanding clause.⁴⁰ This Court recognized in *Figueroa v. Canada (A.G.)* (“*Figueroa*”) that the purpose of section 3 is “to promote and protect the right of each citizen to play a meaningful role in the political life of the country. Absent such a right, ours would not be a true democracy”.⁴¹ Participation in the electoral process has an “intrinsic value independent of its impact upon the actual outcome of elections.”⁴²

³³ An example of the application of the section 6 right of entry is found in *Abdelrazik v. Canada (Minister of Foreign Affairs & International Trade)*, 2009 FC 580, at paras 7, 169. The applicant was a Canadian-born citizen living in the Canadian embassy in Sudan after his Canadian passport expired. The Federal Court declared that the applicant’s section 6 *Charter* right had been breached, and ordered the Crown to issue him an emergency passport and return him to Canada.

³⁴ *Canada Pension Plan*, R.S.C., 1985, c. C-8, sections 107(1) and (4).

³⁵ *Old Age Security Act*, R.S.C., 1985, C. O-9, section 40(1).

³⁶ *Citizenship Act*, R.S.C. 1985, c. C-29, sections 3(1)(b), 3(3), 5.1 [*Citizenship Act*]; *Citizenship Regulations*, SOR/93-246, sections 5.1(c)-(d), 5.2(c)-(d), 5.3(b).

³⁷ *Citizenship Act*, *ibid.*, s. 9(1).

³⁸ *Frank – Court of Appeal Decision*, *supra* note 5, at para. 138 (per Strathy C.J.O. for the majority).

³⁹ *Entchev Affidavit* at para. 38. See also: *Frank – Court of Appeal Decision*, *supra* note 5, at para. 81 (per Strathy C.J.O. for the majority).

⁴⁰ *Charter*, *supra* note 3, s. 33(1).

⁴¹ *Figueroa v. Canada (A.G.)*, 2003 SCC 37 at para. 30 [*Figueroa*] (per Iacobucci J. for the majority).

⁴² *Figueroa*, *ibid.*, at para. 29 (per Iacobucci J. for the majority).

29. The right to participate in the electoral process is not merely the capacity to cast a ballot in connection with some quid pro quo with the state. As signaled in *Figueroa*, it more broadly protects a citizen's sense of belonging and association to Canada that is vital to the flourishing of the individual, as well as the collective democratic interest of incorporating the diverse viewpoints, ideas and lived experiences of the wider electorate – including unique viewpoints and outlooks on the world developed abroad.
30. In this case, the impugned provisions in the Act run counter to these important aspects of the right to vote by deliberately excluding expatriate Canadians from the electorate, insulating Canadian elections from the views of “foreign” Canadians and stigmatizing those Canadians as unworthy outsiders and second-class citizens. This is harmful to those citizens as individuals, and to Canadian democracy on the whole.⁴³
31. The impugned provisions in the Act could also result in the complete disenfranchisement of Canadian citizens living abroad for more than five years if they are not also citizens of the country in which they reside (or dual citizens with another country that allows them to vote). For example, Canadians holding only Canadian citizenship who have lived in the United States for more than five years under non-immigrant visas issued under the North American Free Trade Agreement (“NAFTA”) cannot vote in the United States. It is ironic that the Government of Canada, through its support of the NAFTA and otherwise, has encouraged Canadian citizens to access the United States labour market, only to take the position that such citizens lack engagement in Canadian affairs if they reside outside of the country for more than five years.⁴⁴
32. In this case, the voices of Canadian citizens are being deliberately silenced. As noted by this Court in *Sauvé v. Canada (Chief Electoral Officer)* (“*Sauvé #2*”), silenced messages cannot be retrieved.⁴⁵ The marketplace of ideas in Canadian political discourse is less vibrant and diverse as a result.

⁴³ Entchev Affidavit at para. 39.

⁴⁴ Entchev Affidavit at para. 40.

⁴⁵ *Sauvé v. Canada (Chief Electoral Officer)*, 2002 SCC 68 at para. 60 [*Sauvé #2*].

33. Bearing in mind these individual and collective goods that section 3 is intended to safeguard, any limits on section 3 of the *Charter* rightly demand heightened scrutiny as opposed to simple deference to Parliament. A stringent justification analysis is required where Parliament has infringed “a crucial right such as the right to vote” on the basis of “symbolic and abstract reasons”.⁴⁶ Heightened scrutiny is further warranted given that section 3 does not contemplate a second-tier of Canadian citizenship and because its terms contain no limits on the right to vote other than citizenship.⁴⁷

PART IV - COSTS

34. If leave to intervene is granted, the CABA will seek no order as to costs, and will ask that no costs be awarded against it. It is a non-profit organization with limited resources.⁴⁸

PART V - ORDER SOUGHT

35. The CABA seeks an order granting it leave to intervene in the appeal before this Court, including the right to file a factum not to exceed ten (10) pages, and the right to make oral argument at the hearing not exceeding fifteen (15) minutes.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 19th day of September, 2016.

per:  _____
Bradley E. Berg

 _____
Max Shapiro

per:  _____
Peter W. Hogg

Blake, Cassels & Graydon LLP

Counsel for the Proposed Intervener,
The Canadian American Bar Association

⁴⁶ *Sauvé* #2, *ibid.*, at para. 23; see also paras. 13-14, 16.

⁴⁷ *Frank – Application Decision*, *supra* note 5, at para. 79, citing *Fitzgerald (Next Friend of) v. Alberta*, 2002 ABQB 1086 at para. 14, *aff’d* 2004 ABCA 184, leave to appeal to S.C.C. refused, [2004] S.C.C.A. No. 349.

⁴⁸ *Entchev Affidavit* at para. 44.

PART VI - TABLE OF AUTHORITIES

<u>No.</u>	<u>Cases</u>	<u>Paragraph(s)</u>
1.	<i>Frank et al. v. Canada (Attorney General)</i> , 2014 ONSC 907	5, 23, 24, 33
2.	<i>Frank v. Canada (Attorney General)</i> , 2015 ONCA 536	5, 13, 26, 27
3.	<i>Reference re Workers' Compensation Act (1983) (Nfld.) (Application to Intervene)</i> , [1989] 2 S.C.R. 335	8, 19
4.	<i>Abdelrazik v. Canada (Minister of Foreign Affairs & International Trade)</i> , 2009 FC 580	25
5.	<i>Figueroa v. Canada (Attorney General)</i> , 2003 SCC 37	28, 29
6.	<i>Sauvé v. Canada (Chief Electoral Officer)</i> , 2002 SCC 68	32, 33

PART VII - RELEVANT STATUTES

- | <u>No.</u> | <u>Statute</u> |
|------------|---|
| 1. | <i>Canadian Charter of Rights and Freedoms</i> , Part I of the <i>Constitution Act, 1982</i> , being Schedule B to the <i>Canada Act 1982</i> (U.K.), 1982, c. 11 |
| 2. | <i>Canada Elections Act</i> , S.C. 2000, c. 9 |
| 3. | <i>Income Tax Act</i> , R.S.C. 1985, c. 1 (5th Supp.) |
| 4. | <i>Income Tax Regulations</i> , C.R.C., c. 945 (Income Tax Act) |
| 5. | <i>Criminal Code</i> , R.S.C. 1985, c. C-46 |
| 6. | <i>Corruption of Foreign Public Officials Act</i> , S.C. 1998, c. 34 |
| 7. | <i>Special Economic Measures Act</i> , S.C. 1992, c. 16 |
| 8. | <i>Extractive Sector Transparency Measures Act</i> , S.C. 2014, c. 39, s. 376 |
| 9. | <i>Canada Pension Plan</i> , R.S.C., 1985, c. C-8 |
| 10. | <i>Old Age Security Act</i> , R.S.C., 1985, c. O-9 |
| 11. | <i>Citizenship Act</i> , R.S.C. 1985, c. C-29 |
| 12. | <i>Citizenship Regulations</i> , SOR/93-246 |